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HOUSE OF REPRESENTATIVES

REPT. 99-397
Part 2

DEFENSE PROCUREMENT CONFLICT OF INTEREST ACT

MARCH 13, 1986.—Ordered to be printed

Mr. GLICKMAN, from the Committee on the Judiciary, submitted the following

REPORT

APR 1 1986

[To accompany H.R. 2554]

U. S. GOVT. PUBS.
DEPOSITORY 376

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2554) to limit conflicts of interest in defense procurement, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Defense Procurement Conflict of Interest Act".

SEC. 2. CONFLICT-OF-INTEREST IN DEFENSE PROCUREMENT.

(a) IN GENERAL.—Chapter 141 of title 10, United States Code, is amended by inserting after section 2397a the following new sections:

"§ 2397b. Limitations on employment of defense contractors of certain former Department of Defense procurement officials

"(a)(1) Any person who—

"(A) is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

"(B) during the two-year period preceding the person's separation from service in the Department of Defense, participated personally and substantially in a procurement function with respect to a contractor through contact with the contractor while serving in a position identified by the Secretary of Defense under subsection (c)(1),

may not accept compensation from that contractor for a period of two years following the person's separation from service in the Department of Defense, if that contractor is included in the notice provided that person under subsection (b). A person is not subject to the prohibition set forth in this paragraph unless the participation of the person in the procurement function involved decisionmaking responsibilities. For purposes of the preceding sentence, 'decisionmaking responsibilities' include the following activities with respect to a contract: approval or disapproval, or making recommendations or engaging in negotiations with regard to the selected or qualifi-

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cation of the contract or a particular contractor. For purposes of the notice provided under subsection (b), whether or not a person is a contractor as defined in subsection (f)(2)(B) is determined as of the date of the separation from service of the officer or employee of the Department of Defense or member of the armed forces, as the case may be.

"(2) Any person who knowingly and willfully violates paragraph (1) shall be imprisoned for not more than one year and shall be subject to a fine in the amount provided in title 18.

"(3) Any person who knowingly and willfully offers or provides any compensation to another person the acceptance of which is or would be in violation of paragraph (1) shall be imprisoned for not more than one year and shall be subject to a fine in the amount provided in title 18.

"(b)(1) The Secretary of Defense shall give the notice described in paragraph (2) to each officer and employee of the Department of Defense and each member of the armed forces who—

"(A) after the effective date of this section is separated from service in the Department of Defense; and

"(B) during the two-year period before that separation served in a position in the Department—

"(i) that involved personal and substantial participation in a procurement function to the extent to which subsection (a)(1) applies, and

"(ii) that was identified by the Secretary of Defense under subsection (c)(1).

"(2) A notice required by paragraph (1) shall provide the person receiving the notice—

"(A) a written explanation of the provisions of this section; and

"(B) the name of each contractor from whom such person is prohibited from accepting compensation under this section during the two-year period following the person's separation from service in the Department of Defense.

"(c)(1) Not later than 180 days after the date of the enactment of this section, the Secretary of Defense shall prescribe and publish in the Federal Register regulations identifying each position within the Department of Defense that has as one of its duties the management, direction, oversight, or justification, with respect to any product or service, of—

"(A) development;

"(B) production;

"(C) funding;

"(D) operational and developmental testing;

"(E) auditing; or

"(F) acquisition.

This paragraph applies only to civilian positions for which the rate of pay is equal to or greater than the minimum rate of pay payable for grade GS–13 of the General Schedule and to positions held by members of the armed forces in a pay grade of 0–4 or higher.

"(2) Positions identified under paragraph (1) shall include at least each of the following positions with respect to a contract or program (and any other position in which the functions performed are substantially equivalent to any such position):

"(A) The program manager or deputy program manager.

"(B) A program monitor.

"(C) The official responsible for approval of a sole-source contract.

"(D) The head of the system's program office.

"(E) The source selection authority for the system.

"(F) A position in which a person is assigned on a permanent basis in the government plant representative office.

"(3) Regulations under paragraph (1) shall be revised not less often that once each year. Any revision of such regulations shall be published in the Federal Register.

"(4)(A) When a vacancy occurs in a position which—

"(i) is identified under paragraph (1), and

"(ii) is a civilian position to which a person is appointed by the President, by and with the advice and consent of the Senate,

and the Secretary of Defense determines that the duties inherent in such position involve personal and substantial participation in procurement functions (to the extent to which subsection (a)(1) applies) with so many contractors that implementation of subsection (a) with respect to persons serving in such position would seriously hamper the ability of the Department of Defense to obtain the services of a highly qualified person to serve in such position, the Secretary of Defense, with the concurrence of the Director of the Office of Government Ethics, may exempt the

person appointed to fill the vacancy from the provisions of subsection (a) by reason of service in such position.

"(B) Whenever the Secretary of Defense grants an exemption under this paragraph, the Secretary shall promptly submit to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and the Judiciary of the House of Representatives a report describing the exemption and setting forth the specific reasons for the exemption.

"(d) This section does not apply—

"(1) to a contract for an amount less than $100,000; or

"(2) to compensation of a person by an entity that did not have a Department of Defense contract in excess of $100,000 at the time the person participated personally and substantially in a procurement function (to the extent to which subsection (a)(1) applies) with respect to a contract with that entity.

"(e)(1) Any person who is considering the propriety of accepting compensation that might place the person in violation of subsection (a) may, before acceptance of such compensation, apply to the Director of the Office of Government Ethics for advice on the applicability of this section to the acceptance of such compensation.

"(2) An application under paragraph (1) shall contain such information as the Director requires.

"(3) Any person who makes an application under paragraph (1) with respect to the acceptance of compensation may accept the compensation if the person has not been advised to the contrary by the Director within 60 days after the application is made.

"(f) In this section:

"(1) the term 'compensation' inlcudes any payment, gift, benefit, reward, favor, or gratuity—

"(A) which is provided, directly or indirectly, for services rendered; and

"(B) which is valued in excess of $250 at the prevailing market price.

"(2) 'Contractor' means—

"(A) any person that contracts to supply the Department of Defense with goods or services; and

"(B) any person that controls, is controlled by, or is under common control with, a person described in subparagraph (A).

Such term does not include a State or local government or any organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code.

"(3) 'Procurement function' includes, with respect to a contract, any function relating to—

"(A) the negotiation, award, administration, or approval of the contract;

"(B) the selection of a contractor;

"(C) the approval of changes in the contract;

"(D) quality assurance, operational and developmental testing, the approval of payment, or auditing under the contract; or

"(E) the management of the procurement program.

"(4) 'Armed forces' means the Army, Navy, Air Force, and Marine Corps.

"(g) For the purposes of this section and section 2397c of this title, a member or former member of the armed forces shall be considered to have been separated from service in the Department of Defense upon such member's discharge or release from active duty.

"§ 2397c. Requirements of defense contractors concerning former Department of Defense officials

"(a)(1) With respect to any contractor who in any fiscal year enters into contracts with the Department of Defense for the procurement of goods and services in amounts aggregating $1,000,000 or more, each contract for procurement of goods or services entered into by the Department of Defense with that contractor in the succeeding fiscal year shall include a provision under which the contractor agrees not to provide compensation to a person if the acceptance of such compensation by such person would violate section 2397b(a)(1) of this title.

"(2) Such a contract shall also provide that if the contractor knowingly violates a contract provision required by paragraph (1) the contractor shall pay to the United States, as liquidated damages under the contract, an amount equal to the greater of—

"(A) $100,000; or

"(B) three times the compensation paid by the contractor to the person in violation of such contract provision.

"(b)(1)(A) Each contractor subject to a contract term described in subsection (a) shall submit to the Secretary of Defense not later than April 1 of each year a report

covering the previous calendar year. Each such report shall list the name of each person (together with other information adequate for the Government to identify the person) who—

"(i) is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

"(ii) was provided compensation by that contractor during the preceding calendar year, if such compensation was provided within two years after such officer, employee, or member left service in the Department of Defense.

"(B) Each such listing shall—

"(i) show each agency in which the person was employed or served on active duty during the last two years of the person's service in the Government;

"(ii) show the person's job titles during the last two years of the person's service in the Government; and

"(iii) contain a description of the duties (if any) that the person is performing on behalf of the contractor.

"(2) Any person who knowingly and willfully fails to file a report required by paragraph (1) shall be fined not more than $10,000.

"(3) The Secretary of Defense shall review each report under paragraph (1) to assess the report for accuracy and completeness and for the purpose of identifying possible violations of paragraph (1), of subsection (a), or of section 2397(a) of this title. The Secretary shall report any such possible violation to the Attorney General.

"(c) The Director of the Office of Government Ethics shall have access to the reports submitted under subsection (b)(1) and shall conduct an annual random review of the reports for violations of section 2397b(a) of this title and subsections (a) and (b)(1). The Director shall submit a report to the Congress not later than October 1 of each year on the operation of this section, including the findings of the Director based on the examination of reports for the preceding calendar year. The first such report shall be submitted not later than October 1, 1987.

"(d) This section does not apply to a contract for an amount less than $100,000.

"(e) The definitions set forth in section 2397b(f) of this title shall apply to this section.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 141 of title 10, United States Code, is amended by inserting after the item relating to section 2397a the following new items:

"2397b. Limitations on employment by defense contractors of certain former Department of Defense procurement officials.

"2397c. Requirements of defense contractors concerning former Department of Defense officials.".

SEC. 3. REPEAL.

Effective on the effective date of this Act, section 921 of the Defense Procurement Improvement Act of 1985 (title IX of Public Law 99-145; 10 U.S.C. 2397a note) is repealed.

SEC. 4. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsections (b) and (c), this Act and the amendments made by this Act take effect 180 days after the date of the enactment of this Act.

(b) EFFECTIVE DATE FOR REGULATORY AUTHORITY.—Section 2397b(c) of title 10, United States Code, as added by section 2 of this Act, takes effect on the date of the enactment of this Act.

(c) EFFECT ON EMPLOYMENT.—(1) The amendments made by this Act—

(A) do not preclude the continuation of employment that began before the effective date of this Act or the acceptance of compensation for such employment; and

(B) do not, except as provided in paragraph (2), apply to a person whose service in the Department of Defense terminates before the effective date of this Act.

(2) Paragraph (1)(B) does not preclude the application of the amendments made by this Act to a person with respect to service in the Department of Defense by such person on or after the effective date of this Act.

BACKGROUND

Current federal law contains several post-employment conflict-of-interest, or "revolving door", restrictions which apply to military and civilian executive branch employees. The general purpose of these statutes is to limit the employment of these personnel after they leave government service in order to protect the Government

and the public from harm which may occur when former officers and employees take with them confidential information upon leaving the government. These statutes are also designed to ensure that employees base their decisions on the public interest while they are still in government service, rather than basing these decisions on the need to find employment when they leave government service.

The main statute of general applicability which currently limits post-employment activity is 18 U.S.C. 207, which was most recently amended in 1978 and 1979 through enactment and modification of the Ethics in Government Act of 1978.

Section 207 sets forth a series of bars for former government employees which can be summarized as follows:

1. a permanent bar on acting as agent or attorney before the government on a matter in which the former employee was personally and substantially involved during government service and regarding which the former employee participated in making a decision;

2. a two-year bar on serving as agent or attorney before the government on any specific matters that were under the former employee's official responsibility in his or her last year of government services;

3. a two-year bar, as to senior officials only, on assisting in representation by personal appearance before the government on any matter in which the former employee personally and substantially participated while in government service; and

4. a one-year bar, for senior officials only, on *any* contact on *any* matter with the agency which formerly employed the senior official.

The penalty for violating Section 207 is a fine of not more than $10,000 or imprisonment for not more than two years, or both.

These provisions have a substantially different focus than those of H.R. 2554, because they prohibit certain *representational* activity. They do not prohibit individuals from taking jobs with particular companies.

Another bar relating to post employment activities is set forth in 18 U.S.C. 208. This statute prohibits current executive branch personnel from participating personally and substantially in any decision in which the employee has a direct or indirect financial interest or which affects any person or organization with whom the employee is negotiating or has arranged for future employment. Again, the penalty for violating these bars is a fine of not more than $10,000 or two years imprisonment, or both.

In addition to these specific criminal prohibitions, all executive branch employees are subject to Executive Order 11222 (President Lyndon B. Johnson, May 8, 1965), and regulations implementing this order (5 CFR Part 735 and 32 CFR Part 40). This order requires all employees to "avoid any action, whether or not specifically prohibited . . . which might result in or create the appearance of" a conflict of interest.

Certain former officers and employees of the Department of Defense are subject to a special reporting requirement which is set forth in 10 U.S.C. 2397. This provision was recently amended by the Department of Defense Authorization Act of 1986 to strengthen

and expand its requirements (Public Law 99-145). Title 10 now requires a report to be filed by each covered person regarding their employment after leaving government service; requires recusal of an official as to procurement matters affecting a contractor while he is considering an employment offer from that particular contractor; and imposes penalties for violating these prohibitions and reporting requirements. The Defense Authorization Act also contained a new criminal provision which prohibits covered "presidential appointees" from working for certain DOD contractors for two years.

Finally, the Ethics in Government Act of 1978 established the Office of Government Ethics. This office has the responsibility of monitoring Executive Branch employee compliance with ethics standards and statutes; conducting ethics education programs; and advising Executive Branch employees on how to achieve compliance with ethics statutes and standards.

Despite the strengthening of the "revolving door" statute in 1978 and 1979, the changes made in the Defense Authorization Act in 1985, and the creation of the Office of Government Ethics in 1978, there are those who remain concerned about conflicts of interest *and* the appearance of conflicts of interest among current and former government employees.

This concern has been especially evident in the area of defense procurement. The Department of Defense (DOD) buys roughly 75% of the goods and services purchased by the Federal government.[1] There have been cases where contracts have been managed by personnel who then left government service to work for the contractors whose work they had been supervising. Some allege that prior to actually leaving government service, these former government employees sought to curry favor with these contractors in order to obtain such employment, and that in doing so, these employees did not administer the contracts in the best interests of the government. Further, some believe that the movement of such employees to jobs with contractors have a negative effect on the morale of those who stay in government service. The purpose of H.R. 2554 is to avoid both such actual conflicts of interest and the appearance of such conflicts.

The Committee recognizes that the broad allegations of the existence of conflicts of interest are difficult either to prove or to refute on the basis of the existing evidence. In fact, all such evidence presented to the Committee which tended to establish a problem was anecdotal in nature. Only rarely have any former employees been disciplined for ethics violations: very few referrals have been made by agencies to the Department of Justice for prosecution of violations of the conflicts of interest statutes, and agencies have generally made little use of the administrative enforcement authority provided by the Ethics in Government Act. As the General Accounting Office stated in a report issued in 1983:

> "Because of the lack of information, it is difficult to determine whether this [failure to impose penalties] repre-

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[1] Statement of Dr. Gordon Adams, Director, Defense Budget Project, to the Senate Armed Services Committee, page 2, March 19, 1985.

sents as adherence by former employees to the provisions of the post-employment statute, or an inaction or inability on the part of agencies to identify violations, handle them administratively, or refer them to the Department of Justice and for Justice to prosecute." *Information on Selected Aspects of the Ethics in Government Act of 1978,* Report by the Comptroller General, February 23, 1983.

Nevertheless, the Committee believes that the Department has faced both real and potential conflicts of interest among its employees which need to be addressed by new statutory prohibitions.

Provisions of the Amendment in the Nature of a Substitute to H.R. 2554 As Reported by the Armed Services Committee

H.R. 2554, as reported by the Armed Services Committee, would prohibit an officer or employee of DOD who had significant responsibilities for a procurement function with respect to a contractor during the two years prior to separation from service from accepting any compensation from that contractor for two years following the individual's separation from service in DOD. A former officer or employee who violated this required would be subject to a fine of not more than $10,000 or one year in prison, or both. A contractor who offered or provided such compensation would be subject to the same penalties. The Secretary of Defense may grant a waiver as to the two year bar if a position involves dealing with such a large number of contractors that qualified people will not otherwise accept an appointment to the position.

The Armed Services version of H.R. 2554 requires all future procurement contracts entered into by DOD to include a provision by which the contractor agrees not to provide compensation for individuals covered by the two year prohibition, and agrees to liquidated damages of the greater of $100,000 or three times the amount of compensation paid to the individual in the event this contract provision is violated.

In addition, this version of H.R. 2554 requires procurement employees and officers of DOD to promptly report all contracts by contractors regarding future employment, and to disqualify themselves from performing procurement functions as to such contractors while these contracts continue. A criminal fine of up to $10,000 can be imposed for violations of these requirements.

Finally, contractors are required to file annual reports to the Secretary of Defense on each former officer or employee who left government service within two years of the report. The Secretary must review the reports and notify the Attorney General of any possible violations of the Act. The Director of the Office of Government Ethics is required to submit an annual report to Congress on the basis of a random review of the reports.

Issues Raised by H.R. 2554

First, H.R. 2554 raises a basic constitutional consideration because of its limitation on the ability of former government employees to earn their living as they choose. The existing post-employment prohibitions of 18 U.S.C. 207, to the extent they have been

tested in the courts, have been found to be a rational means of achieving a legitimate government purpose: i.e., protecting the integrity of the government decision-making process. *United States* v. *Nasser*, 476 F.2d 1111 (7th Cir. 1973). However, it is possible that at some point an extremely restrictive limit on post-employment activities might be so burdensome and unreasonable that it would constitute a deprivation of liberty or property without due process of law. *United States Constitution, Article V.* Under H.R. 2554, it is possible that specialists involved in Department of Defense contracting on sophisticated research may be unable to be employed in their field of expertise if the Department of Defense contractor is the only place such research is ongoing.

Therefore, the Committee concluded that these constitutional concerns require that the employment prohibition imposed by the bill should be stated so as to focus it as precisely as possible on the individuals and positions as to which conflicts and appearances of conflicts are most likely to occur. A number of the changes contained in the Committee substitute would accomplish this goal.

Second, H.R. 2554 raises the same essential policy question that has been raised by every proposed prohibition on the post-employment activities of executive branch employees: to what extent can post-employment activities be limited while at the same time not making it impossible to recruit both young and experienced individuals to government service. The existence and extent of a recruitment problem created by such limitations is difficult to substantiate, particularly at the level of presidential and other political appointees. This is in part because there may be a combination of reasons why individuals do not seek, or refuse to accept, government appointments, of which these limitations may be one. Nevertheless, when the Ethics in Government Act Amendments to the current "revolving door" law were enacted in 1978 (18 U.S.C. 207), a number of high level personnel *did* leave government to avoid the new prohibitions. Because of the loss of these personnel and the threatened loss of many additional officials, the Carter Administration supported the 1979 amendments which limited the scope of the prohibitions, even though it had originally drafted the stricter 1978 version.

H.R. 2554, as amended by the Armed Services Committee, prohibits former DOD civilian and military officers and employees from going to work in any capacity for any contractor regarding whom, during his last two years of government service, the former employee had "significant responsibility for a procurement function". This prohibition lasts for two years after the individual leaves government service in DOD. The Department is required to notify the individual of those contractors who are prohibited as to that particular employee.

The Committee has substantial concerns that the reach of this prohibition could be extremely broad as to a particular individual. In addition, the Committee believes that the administrative burden on the Department of Defense will be extensive because of the nature of government contracting and the large number of contractors and of companies related to contractors by ownership ties.

To understand the potential impact of this prohibition, the Committee examined a few actual examples in a particular agency within the DOD, the Defense Logistics Agency.

The Defense Logistics Agency (DLA) buys supplies and equipment for the Department of Defense. It has ten regions, of which the St. Louis region is 8th or 9th in size.

The St. Louis office of DLA had, as of the date of the Committee's inquiry on February 27, 1986, 38 administrative contracting officers and 254 quality assurance officers.[2] Some of these employees were assigned to a single contractor and some to a multitude of contractors on that date. All had "significant responsibility for procurement functions" as to their assigned contractors on that date.[3]

One of these individuals, an administrative contracting officer in Denver, was assigned to 168 contractors on February 26, 1986. These contractors included: *Westinghouse,* which has *18 subsidiaries* including 7-Up, Thermo-King, Longine-Whitnauer Watches, Group W, and Muzak; Raytheon, which has *21 subsidiaries* including Amana, Caloric, Seismograph Service Corp., and Lexington Books; *Parke Davis & Co.,* owned by *Warner Lambert* which has five divisions and two subsidiaries; *Litton Systems,* a subsidiary of *Litton Industries, Inc.,* which has *90 subsidiaries and divisions* involved in such areas as petroleum, data communications, office furnishings, and microwave ovens; and *Bell Industries, Inc.,* which has *19 divisions* (including Midwest Mobile Home Supplies) involved in such areas as plumbing, graphic arts, and heating and air conditioning. In addition to these companies, as stated before, *this employee had 162 additional contractors under his responsibility.* Also, it is important to keep in mind that over any given two year period, any of these contractors may be reassigned or others added as the need arises or the individual officer moves through various job assignments.

Under the Armed Services version of H.R. 2554, this individual could not work in any capacity for any of these contractors, nor could he work for any of their parents, subsidiaries, or affiliates, for two years if any combination of DOD contracts with the contractor, its parent, subsidiaries, and affiliates reached $100,000 at any time the employee dealt with the contractor in his last two years of government service.

Clearly then, the impact of H.R. 2554 can be great on an individual employee—and on contractors. Department employees will need to keep records throughout their careers in procurment *in the event* they *may* leave government service at an unplanned time. Some individuals may face substantial difficulty in finding *any* employment in their field of expertise. In addition, a contractor, in order to comply with the bill's requirements, will need to verify the past procurement activities of potential employees, even though

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[2] This list does not include the "buying operation" ("Purchasing Contract Officers") beause these officers work from a central location rather than in the geographic regions. DLA has informed the Committee that over a five year period, each purchasing contract officer will probably "participate personally and substantially" through "decisionmaking" with each of 12,000 contractors.

[3] From the list provided to the Committee, it is impossible to tell which contractors meet the "floor" coverage of $100,000 in contracts with the Department of Defense at the time the individual dealt with the contractor.

the contractor may have no valid, independent method of doing so other than through the potential employee himself.

Third, H.R. 2554 will also place a substantial administrative burden on the Department of Defense, which will be required to:

—Monitor the contract relationships of each possibly convered individual *at all times* because such individuals may leave government service *at any time.*

—Determine, *when any possibly covered individual leaves government service,* if that employee is actually covered by the terms of the bill.

—Determine, *when the employee actually leaves government service,* which contractors (including parents, subsidiaries, and affiliates) had $100,000 in contracts with the Department of Defense *at the time* the individual had "significant responsibilities for a procurement function" with the contractor.

—Identify *the parent* and all of *the subsidiaries* and *affiliates* of the contractor. This list will always be subject to change, even after an employee actually leaves government service because of such events as mergers and acquisitions of various types.

—Provide *each covered individual* with a list *specifying by name* those contractors from whom the individual may not accept employment.

In addition, the Department must monitor the reports contractors must file under the bill, and must ensure that all covered contracts include the required "liquidated damage" provisions.

It is difficult to assess the exact costs to the government of these new recordkeeping and notice requirements, and the bill authorizes no new funds to cover these costs.

Because of all these burdens on individual former employees, contractors, and DOD, the Committee again believes it is critical to focus the applicability of the bill to reduce any burdens that are not clearly related to achieving the goal of preventing conflicts of interest.

Finally, because of its criminal penalties, H.R. 2554 raises questions regarding the precision of its language. The Committee believes that it is essential to make the language of its provisions as precise and clear as possible. Therefore, the substitute amendment contains a number of changes which accomplish this goal.

Committee Consideration

H.R. 2554 was favorably reported with amendments by the Armed Services Committee on November 21, 1985. The Judiciary Committee received a sequential referral of the bill until March 15, 1986.

The Subcommittee on Administrative Law and Governmental Relations held two hearings on H.R. 2554. The witnesses at these hearings were as follows:

Hearing on January 29, 1986

Honorable Charles E. Bennett
Honorable Barbara Boxer
Mr. John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice

Mr. Derek J. Vander Schaaf, Deputy Inspector General, Office of the Inspector General, Department of Defense
Mr. Ray Kline, President, National Academy of Public Administration

Hearing on January 30, 1986

Ms. Kathleen A. Buck, Assistant General Counsel (Legal Counsel), Department of Defense
Mr. David Martin, Director, Office of Government Ethics
Ms. Ann McBride, Senior Vice President, Common Cause
Mr. Hugh Witt, Vice President, United Technologies Corporation, representing Aerospace Industries Association of America

On March 4, 1986, the Subcommittee recommended the bill favorably to the full Committee with amendments.

On March 11, 1986, the Committee considered H.R. 2554 and adopted all but one of the amendments recommended by the Subcommittee, as well as additional amendments. The Committee then favorably reported these amendments to the House as a single substitute amendment for the Amendment in the Nature of a Substitute reported by the Committee on Armed Services.

Explanation of the Committee Substitute Amendment

The Committee recommends a number of changes to H.R. 2554, which are incorporated in a single substitute amendment.

This substitute is designed to conform the provisions of H.R. 2554 to the provisions enacted last summer as part of the Defense Authorization Act, so that the requirements are not duplicative, overlapping, or contradictory. It also incorporates substantive changes which are intended to eliminate unnecessary and costly administrative burdens on individual contractors and the Government, and to make the bill more precise as to who is covered and what type of behavior is proscribed.

The main features of the substitute include:

1. H.R. 2554 is restructured as an amendment to title 10, so that the new requirements will fit with the amendments to title 10 that were enacted in the Defense Authorization Act last summer. This restructured format deletes the provisions of H.R. 2554 relating to the reporting of employment contacts, since substantially similar provisions were enacted as part of the Authorization Act.

2. The new criminal prohibition is limited to those who "participated personally and substantially" in a procurement contract in a "decisionmaking"capacity. The Armed Services bill had applied to those who had "significant responsibilities."

The Committee recommends that change because it conforms the language of the bill to the language of the current revolving door statutes, which has a history of administrative and court interpretation. It also focuses on those who could actually use their positions in an improper way for the purpose of obtaining employment with a contractor.

3. The substitute provides that the contractors for whom a former employee may not work are *determined as of the date of the employee's separation from government service.*

This provision is necessary because an employee may go to work for a company that is not prohibited at the time but which is, within in two years, purchased by, or otherwise brought into a legal relationship with, a prohibited contractor. Without this change, the former government employee would have to quit his new job or be in violation of the two year prohibition.

This amendment would in no way dilute the main purpose of the bill, which is to prevent current, not former, federal employees from currying the favor of contractors.

4. The criminal provisions were amended to apply to "willful" and "knowing" violations, whereas the Armed Services version used only the "knowing" standard. In addition, the criminal fines are conformed to the standard fines for misdemeanors under title 18.

5. The substitute applies the prohibitions of the bill only to civilian positions at the level of GS–13 and above and to military positions at the level of 0–4 (major in the Army) and above. Otherwise, the coverage and impact of the bill on DOD employees, contractors, and the government would be unfairly broad as well as much more costly to administer.

6. The language requiring the Secretary of Defense to issue regulations identifying positions involved in procurement activities is modified—and expanded—to insure that positions will be included in the regulations even if their responsibilities are not limited to having as their "primary duty" the management, direction, oversight, or justification of "a particular" product.

In addition, the list of positions the Secretary of Defense must designate is modified to delete groups of collegial decisionmakers. The Committee believes that it is highly unlikely that the members of a *group* would all seek employment at the same time with the same contractor.

7. The waiver provision is amended so that it will be available only for civilian presidential appointees whose appointment is subject to the advice and consent of the Senate. Moreover, the Committee notes regarding waivers that the Director of the Office of Government Ethics should issue a formal written statement setting forth his concurrence with the granting of any waiver by the Secretary of Defense.

8. The substitute adds a provision which allows employees to accept employment if the Office of Government Ethics does not advise them of a conflict within 60 days of their application for an advisory opinion.

9. The substitute makes modifications to four of the definitions contained in the bill:

a. The definition of "Compensation" is modified so it will apply only if it is given for "services rendered". Otherwise, the definition might operate to preclude an accountant from joining a firm where even one partner had one client who was a proscribed contractor (or the parent, subsidiary, or affiliate of that contractor). Bribery laws will continue to cover situations where current employees exchange a decision for some type of benefit. The modification also deletes payments from "third persons" because the Committee believes the term was too broad and might result in unintended applications of the provi-

sion. Finally, the modification raises the figure from $100 to $250, which is the amount used in the Ethics in Government Act.

b. The substitute redefines "contractor" to delete from coverage: (1) state and local governments, so that former employees could work for these governments and could also run for elective office at the state and local levels; and (2) non-profit corporations. In addition, the substitute deletes parents, subsidiaries, and affiliates from the definition of contractor, and instead substitutes "any person that controls, or is controlled by, or is under common control with, a contractor. This change is made because of the broad scope of the terms originally used.

c. The definition of "procurement function" is conformed to the new definition enacted by Public Law 99-145.

d. The definition of "Armed Forces" is modified to delete Coast Guard because of the indefiniteness of when coverage would apply to the Coast Guard.

10. The substitute modifies the provision requiring contractor reports on former government employees by deleting the requirement that a contractor submit information that would not be in a contractor's knowledge, i.e., a full and detailed description of what the former government employee did while in government service.

11. The substitute repeals the criminal provision enacted as part of the Defense Authorization Act of 1986 (Public Law 99-145) because this provision would be replaced by new Section 2397(b) of title 10, as established by this bill. The presidential appointees who are currently covered under Public Law 99-145 would all come within the coverage of this new provision.

Recommendation—Committee Vote

(Rule XI, clause 2(l)(2)(B))

On March 11, 1985, a quorum being present, the Committee on the Judiciary favorably reported by voice vote H.R. 2554 with a substitute amendment.

Oversight Statement

(Rule XI, clause 2(l)(3)(A))

The Committee on the Judiciary exercises its oversight responsibilities with reference to ethics and criminal laws. The Committee has determined that H.R. 2554 should be favorably reported as amended.

Budget Statement

(Rule XI, clause 2(l)(3)(B))

The sections of H.R. 2554 within the jurisdiction of the Judiciary Committee do not directly provide budget authority nor do they involve new or increased tax expenditures contemplated by clause 2(l)(3)(B) of Rule XI.

Oversight Findings and Recommendations of the Committee on Government Operations

(Rule XI, clause 2(l)(3)(D))

No findings or recommendations of the Committee on Government Operations were received on H.R. 2554 as referred to in clause 2(l)(3)(D) of Rule XI.

Inflationary Impact

(Rule XI, clause 2(l)(4))

In compliance with clause 2(l)(4) of Rule XI, it is stated that the committee recommendations will have no inflationary impact on prices and costs in the operation of the national economy.

Costs

(Rule XIII, clause 7(a)(1))

The costs are those outlined in the cost estimate of the Congressional Budget Office included in this report.

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 12, 1986.

Hon. Peter Rodino,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 2554, the Defense Conflict of Interest Act, as ordered reported by the House Committee on the Judiciary on March 11, 1986.

This bill would prohibit former officers or employees of the Department of Defense or former or retired members of the armed forces who have had significant responsibilities for a procurement function during their final two years of government service from accepting employment or compensation from a government contractor as of April 1, 1986. Violators could be subject to fines and/or imprisonment. The provisions of this bill do not apply to contracts for an amount less than $100,000. Certain other exemptions are permitted at the request of the Secretary of Defense with Congressional approval.

CBO cannot estimate the net budget impact of this bill on the federal government since it is not known how many enforcement actions would be necessary nor how effective the law would be as a deterrent. Any direct or indirect administrative and enforcement costs may be at least partially offset by penalties collected from violators. Additional savings may also be achieved by discouraging conflict of interest in military procurement. In any case, it is estimated that state and local governments would incur no costs as a result of passage of this bill.

Should the Committee so desire, we would be pleased to provide further details on the attached estimate.

With best wishes,

Sincerely,

RUDOLPH G. PENNER,
Director.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 10, UNITED STATES CODE

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Subtitle A—General Military Law

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PART IV—SERVICE, SUPPLY, AND PROCUREMENT

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CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

Sec.
2381. Contracts: regulations for bids.

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2397b. Limitations on employment by defense contractors of certain former Department of Defense procurement officials
2397c. Requirements of defense contractors concerning former Department of Defense officials.

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§ 2397b. Limitations on employment by defense contractors of certain former Department of Defense procurement officials

(a)(1) Any person who—

(A) is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

(B) during the two-year period preceding the person's separation from service in the Department of Defense, participated personally and substantially in a procurement function with respect to a contractor through contact with the contractor while serving in a position identified by the Secretary of Defense under subsection (c)(1),

may not accept compensation from that contractor for a period of two years following the person's separation from service in the Department of Defense, if that contractor is included in the notice provided that person under subsection (b). A person is not subject to the prohibition set forth in this paragraph unless the participation of

the person in the procurement function involved decisionmaking responsibilities. For purposes of the preceding sentence, "decisionmaking responsibilities" include the following activities with respect to a contract: approval or disapproval, or making recommendations or engaging in negotiations with regard to the selection or qualification of the contract or a particular contractor. For purposes of the notice provided under subsection (b), whether or not a person is a contractor as defined in subsection (f)(2)(B) is determined as of the date of the separation from service of the officer or employee of the Department of Defense or member of the armed forces, as the case may be.

(2) Any person who knowingly and willfully violates paragraph (1) shall be imprisoned for not more than one year and shall be subject to a fine in the amount provided in title 18.

(3) Any person who knowingly and willfully offers or provides any compensation to another person the acceptance of which is or would be in violation of paragraph (1) shall be imprisoned for not more than one year and shall be subject to a fine in the amount provided in title 18.

(b)(1) The Secretary of Defense shall give the notice described in paragraph (2) to each officer and employee of the Department of Defense and each member of the armed forces who—

(A) after the effective date of this section is separated from service in the Department of Defense; and

(B) during the two-year period before that separation served in a position in the Department—

(i) that involved personal and substantial participation in a procurement function to the extent to which subsection (a)(1) applies, and

(ii) that was identified by the Secretary of Defense under subsection (c)(1).

(2) A notice required by paragraph (1) shall provide the person receiving the notice—

(A) a written explanation of the provisons of this section; and

(B) the name of each contractor from whom such person is prohibited from accepting compensation under this section during the two-year period following the person's separation from service in the Department of Defense.

(c)(1) Not later than 180 days after the date of the enactment of this section, the Secretary of Defense shall prescribe and publish in the Federal Register regulations identifying each position within the Department of Defense that has as one of its duties the management, direction, oversight, or justification, with respect to any product or service, or—

(A) development;

(B) production;

(C) funding;

(D) operational and developmental testing;

(E) auditing; or

(F) acquisition.

This paragraph applies only to civilian positions for which the rate of pay is equal to or greater than the minimum rate of pay payable for grade GS–13 of the General Schedule and to positions held by members of the armed forces in a pay grade of O–4 or higher.

(1) Positions identified under paragraph (1) shall include at least each of the following positions with respect to a contract or program (and any other position in which the functions performed are substantially equivalent to any such position):

(A) The program manager or deputy program manager.

(B) A program monitor.

(C) The official responsible for approval of a sole-source contract.

(D) The head of the system's program office.

(E) The source selection authority for the system.

(F) A position in which a person is assigned on a permanent basis in the government plant representative office.

(3) Regulations under paragraph (1) shall be revised not less often than once each year. Any revision of such regulations shall be published in the Federal Register.

(4)(A) When a vacancy occurs in a position which—

(i) is identified under paragraph (1), and

(ii) is a civilian position to which a person is appointed by the President, by and with the advice and consent of the Senate,

and the Secretary of Defense determines that the duties inherent in such position involve personal and substantial participation in procurement functions (to the extent to which subsection (a)(1) applies) with so many contractors that implementation of subsection (a) with respect to persons serving in such position would seriously hamper the ability of the Department of Defense to obtain the services of a highly qualified person to serve in such position, the Secretary of Defense, with the concurrence of the Director of the Office of Government Ethics, may exempt the person appointed to fill the vacancy from the provisions of subsection (a) by reason of service in such position.

(B) Whenever the Secretary of Defense grants an exemption under this paragraph, the Secretary shall promptly submit to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and the Judiciary of the House of Representatives a report describing the exemption and setting forth the specific reasons for the exemption.

(d) This section does not apply—

(1) to a contract for an amount less than $100,000; or

(2) to compensation of a person by an entity that did not have a Department of Defense contract in excess of $100,000 at the time the person participated personally and substantially in procurement function (to the extent to which subsection (a)(1) applies) with respect to a contract with that entity.

(e)(1) Any person who is considering the propriety of accepting compensation that might place a person in violation of subsection (a) may, before acceptance of such compensation, apply to the Director of the Office of Government Ethics for advice on the applicability of this section to the acceptance of such compensation.

(2) An application under paragraph (1) shall contain such information as the Director requires.

(3) Any person who makes an application under paragraph (1) with respect to the acceptance of compensation may accept the compensation if the person has not been advised to the contrary by the Director within 60 days after the application is made.

(f) In this section:

(1) the term "compensation" includes any payment, gift, benefit, reward, favor, or gratuity—

(A) which is provided, directly or indirectly, for services rendered; and

(B) which is valued in excess of $250 at the prevailing market price.

(2) "Contractor" means—

(A) any person that contracts to supply the Department of Defense with goods or services; and

(B) any person that controls, is controlled by, or is under common control with, a person described in subparagraph (A).

Such term does not include a State or local government or any organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code.

(3) "Procurement function" includes, with respect to a contract, any function relating to—

(A) the negotiation, award, administration, or approval of the contract;

(B) the selection of a contractor;

(C) the approval of changes in the contract;

(D) quality assurance, operational and developmental testing, the approval of payment, or auditing under the contract; or

(E) the management of the procurement program.

(4) "Armed forces" means the Army, Navy, Air Force, and Marine Corps.

(g) For the purposes of this section and section 2397c of this title, a member or former member of the armed forces shall be considered to have been separated from service in the Department of Defense upon such member's discharge or release from active duty.

§ 2397c. Requirements of defense contractors concerning former Department of Defense officials

(a)(1) With respect to any contractor who in any fiscal year enters into contracts with the Department of Defense for the procurement of goods and services in amounts aggregating $1,000,000 or more, each contract for procurement of goods or services entered into by the Department of Defense with that contractor in the succeeding fiscal year shall include a provision under which the contractor agrees not to provide compensation to a person if the acceptance of such compensation by such person would violate section 2397b(a)(1) of this title.

(2) Such a contract shall also provide that if the contractor knowingly violates a contract provision required by paragraph (1) the contractor shall pay to the United States, as liquidated damages under the contract, an amount equal to the greater of—

(A) $100,000; or

(B) three times the compensation paid by the contractor to the person in violation of such contract provision.

(b)(1)(A) Each contractor subject to a contract term described in subsection (a) shall submit to the Secretary of Defense not later than

April 1 of each year a report covering the previous calendar year. Each such report shall list the name of each person (together with other information adequate for the Government to identify the person) who—

(i) is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

(ii) was provided compensation by that contractor during the preceding calendar year, if such compensation was provided within two years after such officer, employee, or member left service in the Department of Defense.

(B) Each listing shall—

(i) show each agency in which the person was employed or served on active duty during the last two years of the person's service in the Government;

(ii) show the person's job titles during the last two years of the person's service in the Government; and

(iii) contain a description of the duties (if any) that the person is performing on behalf of the contractor.

(2) Any person who knowingly and willfully fails to file a report required by paragraph (1) shall be fined not more than $10,000.

(3) The Secretary of Defense shall review each report under paragraph (1) to assess the report for accuracy and completeness and for the purpose of identfying possible violations of paragraph (1), of subsection (a), or of section 2397b(a) of this title. The Secretary shall report any such possible violation to the Attorney General.

(c) The Director of the Office of Government Ethics shall have access to the reports submitted under subsection (b)(1) and shall conduct an annual random review of the reports for violations of section 2397b(a) of this title and subsections (a) and (b)(1). The Director shall submit a report to the Congress not later than October 1 of each year on the operation of this section, including the findings of the Director based on the examination of reports for the preceding calendar year. The first such report shall be submitted not later than October 1, 1987.

(d) This section does not apply to a contract for an amount less than $100,000.

(e) The definitions set forth in section 2397b(f) of this title shall apply to this section.

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SECTION 921 OF THE DEFENSE PROCUREMENT IMPROVEMENT ACT OF 1985

[SEC. 921. POST-GOVERNMENT SERVICE EMPLOYMENT BARS ON SENIOR DEFENSE OFFICIALS

[Whoever being a Presidential appointee in Federal employment acts as a primary government representative in the negotiation of a government contract or the settlement thereof with a defense contractor shall not within two years after the termination of said activities with such contractor accept employment from that contractor and upon a knowing violation of this provision the employee shall be punished, upon conviction, with a prison term of up to one year and a fine of up to $5,000 and said defense contractor

shall forfeit up to $50,000 in liquidated damages to the Federal Government which shall be provided for in the contract. The Secretary of Defense shall implement this provision by appropriate regulations.]

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